MULPHA ENGINEERING SDN. BHD

v.

POLYCOOL ENGINEERING & TRADING SDN. BHD. & 2 ORS.

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CIVIL SUIT NO. 22(24)-1547-85]
24 SEPTEMBER 1993

PRACTICE & PROCEDURE: Claim for goods sold and delivered - Plaintiff applying for summary judgment under O. 14 Rules of the High Court 1980 - SAR granting summary judgment - Appeal against decision of SAR.

The plaintiff sued the first defendant for the balance of the purchase price of goods sold and delivered to the first defendant at the first defendant's request. The second and third defendants were sued as guarantors of the first defendant. The plaintiffs obtained final judgment against the defendants for the sum of RM69,223.45 with interest and the first and third defendants appealed.

Held:

[1] The defence put up by the first and third defendant was indeed a sham intended only to delay the proceedings and having no merit whatsoever. The case for the plaintiff was amply proven by documents exhibited in its various affidavits, all of which showed delivery of the goods to the first defendant and acknowledgment of receipt thereof by someone for and on behalf of the first defendant.

[2] The first and third defendant sought to throw a red herring into the case by raising the amount of RM40,000 which had been paid. However a perusal of the accounts showed that this had been properly accounted for by the plaintiff and in fact the first defendant had been given credit for this amount and what was claimed was only the balance.

[Appeal dismissed with costs. First and third defendants granted leave to appeal to the Supreme Court].

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff-Rhina Bhar; M/s. Rhina Bhar & Associates
For the defendants-James LM Ong; M/s. Ajmer Singh Sandhu & Co.

JUDGMENT

T. Selventhiranathan JC:

This was an appeal by the first and third defendants against the decision of the senior assistant registrar made on 7 May 1987 on an application by the plaintiff that final judgment be entered against them for a sum of RM69,223.45, interest at the rate of 12% per annum from September 1985 to date of payment or realization, and costs.

The plaintiff, Mulpha Engineering Sdn. Bhd. ("Mulpha"), filed the action herein on 5 December 1985 initially against the first defendant, Polycool Engineering & Trading Sdn. Bhd. ("Polycool"), for the balance of the purchase price of goods sold and delivered by Mulpha to Polycool at Polycool's requests.. The statement of claim particularised in detail the invoices relating to the goods and the amounts in respect of each invoice. Mulpha alleged that despite repeated demands, Polycool had failed and neglected to pay the sum claimed.

Polycool filed its defence on 23 December 1985. It denied that the goods particularised in paragraph 3 of the statement of claim were delivered to or received by it. It further denied that it was indebted to Mulpha in the said sum or any sum at all. It was pleaded in the alternative in paragraph 4 of the defence that the goods were bought by description from Mulpha which dealt in goods of that description and that there was an implied condition that the goods were of merchantable quality. Paragraph 5 of the defence stated:

> In breach of the said conditions the said goods were not fit for the said purpose and were unmerchantable.
>
> Particulars
>
> 1. Compressions *(sic)* were not functioning up to specifications.
> 2. Reduced power output.

Polycool denied paragraph 4 of the statement of claim that there were repeated demands for payment, and repeated paragraph 3 of the defence (denial of the delivery of the goods and receipt of them, and further denial of indebtedness *in toto*).

On 22 January 1986, Mulpha applied to enter final judgment against Polycool and the affidavit in support of the application exhibited three

invoices pertaining to the goods supplied to Polycool.

On 11 March 1986, Mulpha applied to amend the summons and statement of claim by adding Eng Koon Long and Tai Eng Chiow as the second and third defendants respectively to the action on the ground that they were the guarantors for the goods and credit granted to Polycool by Mulpha up to a limit of RM80,000. An order was accordingly made so adding them, and Polycool became the first defendant.

Subsequent to this Mulpha withdrew its earlier application to enter final judgment against Polycool with liberty to file afresh.

On 25 June 1986, Mulpha filed a fresh application to enter final judgment against the three defendants. The affidavit in support of this application had exhibited to it a printed purchase order from Polycool dated 14 December 1983 for a total sum of RM103,511 in respect of goods to be delivered to Polycool's customer in Kedah. The receipt of the purchase order was stamped with Mulpha's stamp confirming the order as at 27 December 1983. Copies of the three invoices earlier referred to and the personal guarantee letter of the third defendant were also exhibited. By the guarantee, the third defendant undertook to guarantee payment to Mulpha of all monies due to it in respect of goods and credit given by Mulpha to Polycool, provided that the third defendant's liabilities under the guarantee were not to exceed the sum of RM80,000. The guarantee was a continuing guarantee and was to continue to be binding notwithstanding any change in the status of Mulpha. The guarantee was for a period of three years, from 1 June 1985 to 31 May 1988. The guarantee was also spelt out to be in addition to and not in substitution for any other guarantee or other security Mulpha may have from the third defendant or Polycool or any other person and the third defendant's liability under the guarantee "... shall not prejudice or affect any lien to which you are entitled or any other securities which you may at any time or from time to time hold for or on account of the goods and credit given ... to ... Polycool ...". A further paragraph of the guarantee stated:

> I hereby agree that until all monies and liabilities due or incurred by ... Polycool ... to you shall have been paid or discharged, I will not by any means, or on other grounds claim any set-off [or] counterclaim against ... Polycool ... or any of its partners in respect of any liabilities from me to ... Polycool ... or any of its partners or claim or prove in competition with you in respect of any payment by me hereunder.

The application to enter final judgment was fixed for hearing on 5 February 1987.

On 4 February 1987 the third defendant filed his affidavit in reply. He denied owing the sum claimed and said that the goods in respect of invoices 500223 and 500233 were not delivered to the (first) defendant and the receipt thereof not acknowledged. However, in respect of invoice 500239 the third defendant said that the goods were delivered and the receipt thereof acknowledged. But the goods referred to in this invoice were unmerchantable. Despite that Polycool had made payments to Mulpha up to a total of RM40,000. He claimed that Mulpha had drawn on the cheques by which these payments had been made but had failed to issue' official receipts despite repeated requests. He concluded by stating that there were triable issues and that Mulpha's application should be dismissed with costs.

It is to be noted that although this application to enter final judgment was filed on 25 June 1986 and the date of hearing fixed for 5 February 1987, it was only on 4 February 1987 that the third defendant filed his affidavit in reply. But this application was not heard on 5 February 1987 because, according to the notes of proceedings in the file, the defendants' Counsel fell ill and the matter had to be adjourned.

On 17 March 1987 Mulpha filed an affidavit in reply to the affidavit of the third defendant filed on 4 February 1987. In it Mulpha alleged that the third defendant and Polycool were resorting to lies and putting up a defence which was an absolute sham and an abuse of process, "making it an engine of delay". The affidavit exhibited invoice 500223 which had on it the stamp of Polycool acknowledging receipt of the goods on 11 July 1984. The stamp appeared over the words "Received goods in good condition". There was also a debit note referring to the three invoices and giving details of the amounts due on each invoice. This debit note dated 9 October 1985 was also stamped by Polycool and stated that the interest amount was accepted. There was also a credit note in respect of invoice 500233 for a sum of RM1,000 being credit for overcharging on one air-conditioning unit. This

was dated 21 August 1984 and was acknowledged as being received by Polycool on 23 August 1984. The affidavit also exhibited receipts issued in the name of Polycool for a total sum of RM40,000.

Mulpha's affidavit further stated that Polycool had never complained to Mulpha that the goods had at any time been unmerchantable or that they had not been supplied. The first time that this was raised was in the affidavit of the third defendant and Mulpha stood fast by its statement that excuses were being used by Polycool to wrangle itself out of its obligation and that the same should not be allowed.

The third defendant affirmed a supplementary affidavit which was filed on 25 March 1987. By this affidavit the third defendant denied owing the sum claimed and stated that invoice 500223 dated 5 July 1984 did not show any acknowledgments or date of receipt, thereby clearly indicating that the goods were never delivered. He claimed that the exhibit in Mulpha's affidavit which was stamped with the purported chop of Polycool and initialled "is an afterthought and is false" and that the invoice was not signed by him or by his employees. In relation to the debit note which was exhibited and signed by an employee, it was claimed that the employee who signed it had no knowledge that payments had already been made to Mulpha in respect of invoice 500239. It was alleged that Polycool's clerk was asked to sign the debit note and hand it over to an employee of Mulpha who had despatched it to the third defendant's office. He denied that the invoices related to the business dealings of Mulpha. This supplementary affidavit was largely a repetition of what had been averred earlier and did not merit serious consideration.

Mulpha then filed another affidavit on 3 April 1987 exhibiting further purchase orders on Polycool's letterhead dated 27 June 1984 and 24 July 1984 wherein a sum of RM39,000 was specified.

On 7 May 1987 the senior assistant registrar gave final judgment against the defendants. From this decision the defendants appealed.

The third defendant filed his defence on 2 September 1987. The defence was a general denial of Mulpha's claim. Paragraph 4 of the defence stated that the letter of guarantee given to Mulpha did not refer to the third defendant in his personal capacity and that it was signed by Polycool and not by him. In the alternative the third defendant claimed that it was expressly a term of the letter of guarantee that the guarantee was effective for goods' supplied to Polycool from 1 June 1985 to 31 May 1988 for a period of three years. It was also claimed that the letter of guarantee was bad in law and unenforceable. There was a general denial of all the remaining paragraphs of the statement of claim.

When the appeal came on for hearing before me on 23 June 1993 (,which was a chamber day), Encik James Ong for Polycool and the third defendant raised preliminary objections that Mulpha had not filed its notice of change of solicitors, and that it had delayed in filing its application to enter final judgment.

I found the first objection to be without merit and dismissed it. Mulpha's solicitors had been the same all along except that the name of the firm had changed according to who the partners were. But apart from that there was no real change of solicitors as such, and upon Mulpha's Counsel undertaking to file the notice of change I directed the matter to be proceeded with.

On delay, I found that there was none on the facts. Initially the action had been instituted against Polycool alone and subsequently the earlier application to enter final judgment against Polycool was withdrawn because there was an amendment of the writ of summons and statement of claim to include the second and third defendants. The application herein, to enter final judgment was made soon after that.

Encik James Ong for Polycool and the third defendant submitted at length on what he claimed were discrepancies in the invoices, the purchase orders and the various receipts exhibited. As the Court did not, have sufficient time to complete hearing the matter that day owing to a lengthy chamber list followed by open-Court matters, the parties were asked to put in written submissions by specified dates. The reply of the defendants was to be submitted by 28 July 1993, with the date for decision being fixed for 6 August 1993. However as no reply from the defendants was received by 28 July 1993, I brought forward the date of decision to 2 August 1993 and dismissed the appeal by Polycool and the third defendant with costs. I found as a fact that the defence that Polycool and the third defendant put up was indeed a sham intended only to delay the proceedings and having no

merit whatsoever. The case for Mulpha was amply proven by documents exhibited in its various affidavits, all of which showed delivery of the goods to Polycool and acknowledgment of receipt thereof by someone for and on behalf of Polycool. On the other hand, what Polycool and the third defendant sought to do was to throw a red herring into the case by raising the amount of RM40,000 which had been paid. However, a perusal of the accounts showed that this had been properly accounted for by Mulpha and in fact Polycool had been given credit for this amount and what was claimed was only the balance.

On 19 August 1993, Encik James Ong appeared for the defendants and asked for leave to appeal to the Supreme Court. He submitted that the appeal would relate to questions of fact and questions of law of public interest which had not yet been decided by the Supreme Court, i.e. whether in an application under O. 14 of the Rules of the High Court 1980, the plaintiff and the defendants by their affidavits could improve on their respective pleadings. Apparently when the case was set down for, decision on 2 August 1993 Encik James Ong had rushed off the submission in reply of Polycool and the third defendant to the Court but this had not been received by me when I delivered my decision. Encik James Ong said that the period of the guarantee was from 1985 to 1988 whereas the claim was in respect of goods supplied earlier. Furthermore the statement of claim related to that guarantee only whereas it was only in the affidavit filed subsequently that Mulpha also exhibited earlier guarantees by the third defendant which were identical to that covering the period from 1 June 1985 to 31 May 1988. Encik James Ong submitted further that the claim of fraud committed by Mulpha only came to light when Mulpha filed its Order 14 application. According to him these were questions of law which needed to be decided by the Supreme Court and he requested for leave to appeal as the amount involved was below RM100,000. In these circumstances, I granted Polycool and the third defendant leave to appeal to the Supreme Court even though, the points raised in the reply on their behalf were not before me when I gave my decision.

NOEL KENNETH DAVIDSON

v.

FIRM CORPORATION SDN. BHD.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CIVIL APPEAL NO. T(12)-5 OF 1993]
21 FEBRUARY 1994

TORT: Claim for damages for conversion - Appellant causing the replacement of the authorised signatories of the respondent with the bank - Appellant subsequently withdrawing moneys from the account of the respondent - Moneys were used to pay the debts of the respondent - Whether there was conversion.

PRACTICE & PROCEDURE: Appellant counter-claiming for moneys disbursed on behalf of respondent - Moneys disbursed from the account of HFR of which appellant was the receiver - Appellant counter-claiming in his personal capacity - Whether appellant entitled to judgment on his counter-claim.

EVIDENCE: Evidence given on behalf of appellant that moneys withdrawn from account of respondent was used to pay the debts of the respondent - Whether it was "proved" that the moneys were so used - Documentary evidence of payment destroyed - Whether oral evidence of contents of documents admissible - Application of ss. 65(1)(c) & 63(e) of the Evidence Act 1950 - Whether the evidence adduced was sufficient as prima facie proof that the moneys had in fact been paid for the purposes stated.

The appellant, a partner of a firm of accountants, was appointed as receiver of HFR. HFR was sharing the same office premises as the respondent. During the course of the receivership the appellant caused to be issued, from the account of HFR, sums of money for and on behalf of the respondents including the wages for the respondents' workers, payments for the upkeep of the respondents' machinery, rental due and owing by the respondent and payments to an estate agent for services rendered to the respondent. The appellant subsequently replaced the authorised signatories of the bank account of the respondent with the appellant's nominees and withdrew moneys from the said account which sums were paid to HFR to reimburse the moneys drawn from the account of HFR.

The respondent claimed, against the appellant damages for conversion, and against the bank